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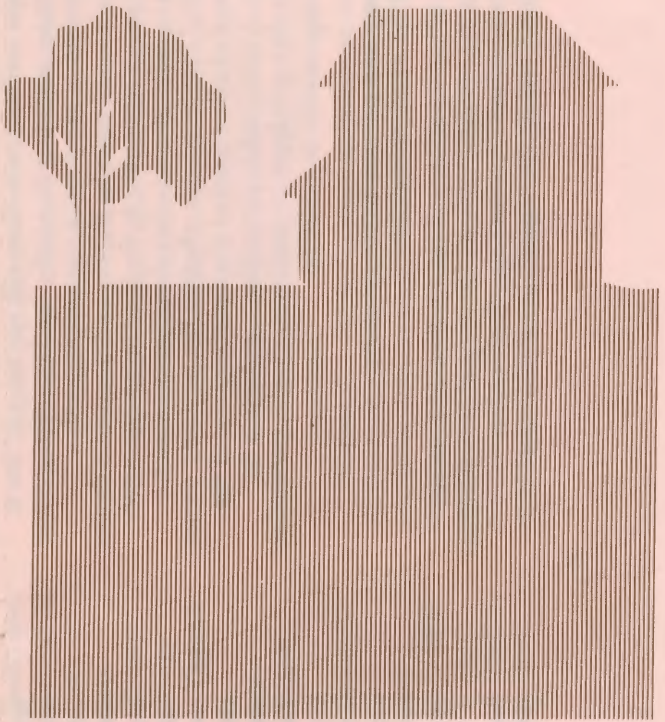
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Condemnation:

Your Rights When The Federal Government Takes Your Land

**Cooperative Extension Service
South Dakota State University
U. S. Department of Agriculture**

Condemnation: Your Rights When The Federal Government Takes Your Land

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When the Federal Government Wants Your Land:

1. **Carefully consider the offer you receive.** If the price offered by the federal government is a fair one, a settlement can work to your overall advantage. But don't make a decision until you are thoroughly informed. Your decision should be based on up-to-date information acquired from some source other than the agency of government that is taking your land. Don't settle unless you have considered all of your damages and are completely satisfied with the price offered.

2. **Get a lawyer.** If you fail in your efforts at negotiating for what you, in good faith, consider to be a fair price, get a lawyer. Nationally, the experience has been that court contests brought in good faith usually result in an award advantageous to the landowner.

What is eminent domain?

The power of eminent domain (the power to "condemn") is inherent in the legal operation of our federal government. This means that, although the U. S. Constitution does not specifically grant the power to the government, it is implied to exist since without it government could not efficiently carry out the functions expected of it.

Our Constitution does, however, limit the scope of this implied power of government. The Fifth Amendment to the United States Constitution states that no private property shall "be taken for public use without just compensation." This does not create the power of eminent domain, but rather limits it in two ways: (1) The federal government may only take land for a "public use"; and, (2) When land is condemned the owner must be paid "just compensation" for what that person has lost. Unless the condemnation comes within these two limitations the taking is unconstitutional.

Each year, agencies of the federal government condemn private land for their own use. Often individual landowners are subject to condemnation procedures before they have had an opportunity to familiarize themselves with their rights under the Constitution and the laws. Indeed, many people are not aware of the source and scope of the federal government's power to condemn land. This publication introduces South Dakotans to the subject of eminent domain, or "condemnation."

The discussion is limited to only those situations where the federal government is taking land. State and local governments and some private corporations also exercise the power of eminent domain, but the various laws that apply to those situations are not covered here.

This material is not meant to serve as a substitute for legal counsel. Every situation is different and must be reviewed in light of unique facts and circumstances. However, this explanation will alert you to the various rights that do exist when the federal government takes land.

What is a public use?

People whose lands are to be condemned for a project often argue that a project is not for public use because they contend that the project is not necessary. This argument is usually ineffective. In fact, the definition of "public use" is so broad that very rarely can a taking be defeated on the basis of not being for a public use.

Once the federal government has declared it necessary to acquire private property for a project such as highway construction, parks and recreation, a reservoir, urban renewal or any other purpose, and has stated that it is for a "public use," that usually settles the issue. There is a strong, if not overwhelming, presumption that in fact such purpose is a "public use."

It is not necessary that the federal agency take the entire holdings of a landowner. Only some part may be taken. Easements and other rights to use land also may be taken.

"Public use" does not necessarily mean that the property taken must actually be put to use by the public. "Public use" is synonymous with "general welfare," the "welfare of the public," the "public good," or the "public benefit." The property taken may actually be put to a private use, as where property is taken to clear an urban blight area, and is resold to private parties.

What other limits are placed upon the federal government when it condemns land?

The power of eminent domain springs from a necessity of government and stems from the superior right of the state over private property. The federal government may exercise the eminent domain power in its own name or delegate it to administrative offices or other agencies, or to public and private corporations. The Congress has the authority to determine whether the exercise of the power is necessary, what property shall be taken, to what extent it will be taken and the mode of acquisition. Except for reasons of fraud, bad faith or deprivation of due process, such determinations are generally not reviewable by the courts.

When taking land, the federal government has an obligation to avoid violating the constitutional provision that guarantees to all individuals the right not to be deprived of property without "due process of law." Every person's right to "due process of law" is a very tangible right that is not to be taken lightly. But it is one that is very difficult to define or precisely describe.

In one respect, "due process of law" means a regular course of proceedings by the condemning agency according to prescribed form and procedures and in accordance with the general rules for the protection of individual rights. The concept certainly assures that processes will be open and that government will not take undue advantage of its obvious ability to dominate individuals through use of financial and political power. "Due process of law" is often used in conjunction with fairness, good faith, and the principles of right and justice. In every respect the due process clause guarantee limits the federal government when it is taking land through the condemnation process.

What is "just compensation" and when must it be paid?

Because the doctrine of "public use" is often broadly interpreted by the courts, "just compensation" is the most important limitation on the exercise of the power of eminent domain.

Generally, a landowner is entitled to be compensated any time the federal government takes some part of the real or personal property owned. Interference by the federal government with any interest in property must be compensated. Examples of

some of the interests for which a landowner is entitled to compensation are: loss of land and improvements on it (including fences if the fences add value to the land); loss of natural drainage due to some public construction; loss of access to roads or other necessary transportation; easements for such things as telephone lines and underground cables; loss of the right to use water; and, loss of enjoyment of land due to low and frequent airplane overflights.

Fair market value usually determines what is "just compensation" in a given case. A common definition of fair market value is the price which the property would bring at the time of taking if offered by a willing seller who is not required to sell, to a willing buyer who is not obliged to buy. Thus, all factors which affect the price that a prudent purchaser would be willing to pay are to be taken into consideration. In addition, all uses to which reasonably prudent persons would put the land are to be considered, including the highest and best (i.e., most profitable) use, even though the property is not being used or taken for such use.

What types of evidence determine just compensation?

Very generally, there are three categories of evidence commonly used in determining what is the fair market value in a given case. They are: (1) Sales or Comparable Sales; (2) Cost or Replacement Cost Less Depreciation; and (3) Capitalization of Income. The first category is nearly always used in valuing undeveloped land, while the last two are often useful in placing a value on improvements on land to be condemned.

Sales or Comparable Sales

A recent voluntary local sale is usually the best evidence of fair market value. Similarly, a recent contract to sell land (contract for deed) carries much influence in market determination. When information about the particular piece of land being taken is not available, information about similar properties—if located near the property being taken and if recently sold—is used as a guide and nearly always will contribute to the determination of the fair market value of undeveloped land.

Cost or Replacement Cost Less Depreciation

Original cost of construction is often used in placing a value on a building, particularly if the building is designed for a special purpose, such as a church, milking parlor or the like. If the buildings are old, replacement cost will be used instead. In this sense, replacement does not mean building an exact reproduction but instead means replacement with a building of substantially equal utility. Once replacement cost is decided upon, that dollar value is then depreciated for wear and tear. Various accounting methods are used in completing the depreciation calculation.

Capitalization of Income.

This category of evidence is usually confined to cases involving commercial buildings. Capitalized income is sometimes defined as the present worth of future potential benefits of property. It is also sometimes defined as the net income which a fully informed person is warranted in assuming the property will produce during its remaining useful life. A capitalization rate reflecting the value of money and the estimated security of the income flow is used in completing this calculation.

But they're only taking part of my land. What compensation will I get?

If, as often happens, the federal government condemns only a portion of a parcel of land, this still can result in a loss of value to the land remaining in private ownership, as when a public highway divides an existing farm unit. This loss of value must be compensated in the form of severance damages.

Where only a part of a single physical unit is taken, the owner is entitled to recover all losses to the remainder that can be directly attributed to either the taking itself or the use of the land taken. Usually the difference between fair market value before and after the taking will determine the damages to be paid. As with other determinations of fair market value, all factors relevant to the particular piece of land will be considered in establishing the amount to be paid.

Can I be compensated when a federal project damages my nearby private landholdings without actually condemning them?

If no part of your land has been taken, you cannot be compensated for indirect or consequential injury unless it can be shown that the injury suffered is peculiar to the property and that there is a **substantial interference** with enjoyment of the property.

With most projects the public as a whole suffers some detriment or indirect injury. For example, a highway increases noise, dust, and pollution and is a safety hazard. Such injury is suffered by the community as a whole and compensation will not be paid for it. Thus, for an adjoining or nearby landowner to recover compensation, a substantial interference with a property interest must be shown, and it must be shown that the injury is peculiar to the land being damaged. The test to determine whether there has been such a substantial interference is whether the property owner is deprived of all or most of the beneficial use of the property. Considerably more than a reduction in market value will have to be shown, but in particular cases compensation is available.

Do tenants and persons buying under a contract for deed have rights?

Yes. When ownership of land is divided between more than one person, the value of the parcel as a whole is first determined. The resulting sum is then apportioned among the various owners or interest

holders. The value of the interest held will determine how much any one person recovers. For example, a person who holds a 10-year lease would recover substantially more than a person who is merely leasing for one year or for a single crop season. Other interest holders who would be entitled to a portion of the recovery under this rule include co-tenants, joint tenants, persons buying under a contract for deed, and mortgagees.

Does the federal agency have to follow certain rules in negotiating with me?

In 1970 the U. S. Congress passed "The Uniform Relocation Assistance and Real Property Acquisition Policies Act." This type of legislative protection and specific consideration for private citizens being dislocated by federal projects was not available until then. This law specifies procedures to be followed by all federal agencies involved in land acquisition:

- (1) The federal agency is directed to make every effort to acquire property by negotiation.
- (2) Property must be appraised by the agency **before** the initiation of negotiations. The owner must be given the opportunity to accompany the appraiser during the inspection of the property.
- (3) Before initiation of negotiations, the agency is required to establish an amount which it believes to be a fair price and make a prompt offer to buy at that amount. The appraised value cannot take into consideration any effect the proposed federal project may have on the fair market value of the property.
- (4) The agency must then provide the landowner a written statement and summary of the basis for the amount it has determined is just compensation. Presumably, this will include the appraiser's report.
- (5) No owner can be required to surrender possession of his or her property before being paid the agreed purchase price. However, if no price is agreed upon, the agency may deposit with a federal court an amount not less than what it has determined to be the fair market value. This entitles the agency to possession, although the amount finally paid to the landowner may be increased by further negotiation or court action.
- (6) No person can be required to move from a residence or move a farm operation or business, without 90 days notice having been given.
- (7) The federal agency is specifically prohibited from advancing the time of condemnation, deferring negotiations or condemnation and the deposit of funds with a court, or taking any other coercive action in order to force an agreement on the price to be paid.
- (8) If the property cannot be acquired by negotiation, and the agency must resort to its power of eminent domain, the federal agency

is required to institute formal condemnation proceedings. This means that no federal agency shall make it necessary for an owner to institute proceedings to prove the fact of the taking of his or her property.

What if they take only part of my land and I can't make a living off the remainder?

The Uniform Relocation Act specifically states that if the acquisition of only part of a property would leave its owner with an uneconomic remnant, the agency must offer to buy the entire property.

Can a landowner or tenant receive assistance in relocating a residence, farm operation or business?

The purpose of the Uniform Relocation Act is "to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of federal and federally assisted programs." The Act contains several specific requirements designed to provide adequate relocation assistance for persons dislocated from their homes, farms or businesses. Basic fairness to all persons affected by the taking of property is guaranteed. The Act requires payment of financial reimbursements to persons who must relocate, development of detailed plans for assisting in relocation, and a program for the direct delivery of relocation services to persons being dislocated.

The policies and requirements of the Act are binding upon all federal agencies as well as state agencies engaged in condemnation of property in connection with federally assisted projects.

What financial assistance is available to displaced landowners?

Whenever the acquisition of real property by the federal government will cause persons to move, or move their personal property, the governmental agency is directed by the Act to pay those persons:

- (1) Actual reasonable expenses in moving a residence, business, farm operation or other personal property.
- (2) Actual losses of tangible personal property as a result of moving or discontinuing a business or farm operation. This is not to exceed an amount equal to the reasonable expenses which would have been required to relocate the property where the owner or tenant was entitled to relocate but chose not to. Typical property losses may include equipment, machinery or fixtures which are no longer required or are not suitable for use at a new location.
- (3) Actual expenses in searching for a replacement business or farm.

Instead of proving actual expenses and losses a person may elect to receive a fixed payment of up to \$300 moving expense allowance and a dislocation allowance of \$200. Also, any person displaced from a place of business or from a farm operation may elect

to receive a fixed payment of the average annual net earnings of the business or farm operation in an amount not less than \$2,500 nor more than \$10,000.

Another section of the Act is based upon the principle that a displaced homeowner should not be left worse off economically than he was before being forced to move, and that he should be able to relocate in a comparable dwelling that is decent, safe and sanitary. Payments are provided up to \$15,000 in addition to all payments otherwise authorized by the Act. Such payments may include:

- (1) The amount, which when added to the acquisition cost of the dwelling taken by the federal agency, equals the reasonable cost of a comparable dwelling house.
- (2) The amount which will compensate for any increased interest costs a displaced person is required to pay for financing the acquisition of a comparable dwelling if the prior dwelling was mortgaged.
- (3) Reasonable expenses incurred for abstracts of title, recording fees and other closing costs incident to the purchase of the replacement dwelling.

The essential factor in recovering relocation expenses is accurate recordkeeping. Most federal agencies will reimburse only those expenses which can be proved by reliable records.

What assistance is available for displaced tenants?

Often the persons who are displaced by a federal or federally assisted project are tenants at will (usually having a lease "from month-to-month"). Such persons receive no money in the condemnation award. A section of the Act, however, provides for payments to persons occupying dwellings but who are not homeowners. Payments under this section shall be either:

- (1) The amount necessary to enable displaced persons to lease or rent decent dwellings adequate to accommodate them in areas not generally less desirable and reasonably accessible to their place of employment, not to exceed \$4,000; or
- (2) The amount necessary to enable such persons to make a down payment (including expenses incurred for evidence of title, recording fees, and other closing costs) on the purchase of a decent, safe, and sanitary dwelling adequate to accommodate them, not to exceed \$4,000, except that if such amount exceeds \$2,000, such persons must equally match any such amount in excess of \$2,000 in making the down payment.

Whenever a federal agency acquires an interest in real property, it acquires the buildings, structures, and other improvements as well. If such buildings, structures, or improvements are the property of a tenant who has the right to remove them, the total compensation for the property is required to be apportioned between the landowner and the tenant.

What notice of benefits are we entitled to?

Landowners must receive notice of the following before or at the time they are made an offer of purchase:

- (1) An explanation of eligibility to receive a replacement housing payment of up to \$15,000 or a rental differential payment of up to \$4,000, depending upon how long the person has owned the land, and the manner in which the exact amount will be computed.
- (2) An explanation of the eligibility requirements to receive payments for replacement housing, increased interest costs, and incidental expenses, and of the option to rent replacement housing.
- (3) In the case of an owner-occupier of 90 days or more, but less than 180 days, an explanation of the option to receive a down payment towards the purchase of replacement housing not to exceed \$4,000 plus additional expenses to purchase replacement housing.

Tenants of 90 days or more are entitled to be personally contacted and furnished in writing:

- (1) The date of initiation of negotiation for purchase of the real property.
- (2) An explanation of the eligibility to receive a rental differential payment not to exceed \$4,000 and the manner in which the exact amount will be computed.
- (3) An explanation of his option to receive down payment for the purchase of replacement housing and incidental expenses.

Owners and tenants of less than 90 days shall be furnished an explanation of eligibility to receive a payment for moving expenses, in addition, of course, to the acquisition price in the case of the owner.

What is a relocation plan and how does it help a displaced landowner or tenant?

The Uniform Relocation Act requires that an agency causing people to be relocated must assure that "within a reasonable period of time, prior to displacement there will be available in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings, . . . reasonably accessible to their places of employment." Thus, displacing agencies must conduct a survey and analysis of the housing and business market into which displaced persons will be forced to attempt to relocate. This study forms the basis of the relocation plan. The plan should identify the needs of each person, family or business to be displaced and describe how those needs will be met at the time of actual relocation. This planning must be commenced at the earliest possible time. If reasonable alternative housing is not available the agency must incorporate into construction planning the cost of building new housing for displaced persons.

Thus, in a few words, the relocation plan is the device through which the agency informs the person who is to be relocated exactly what can and will be done in order to carry out the letter and spirit of the Uniform Relocation Act. The relocation plan is made available to all interested persons through the Relocation Assistance Advisory Program.

What relocation assistance services are available?

The head of every agency which dislocates persons is required to provide a Relocation Assistance Advisory Program not only to displaced persons but also in some circumstances to any person occupying property adjacent to the project area who is caused substantial economic injury. Each relocation assistance program is required to include such services as may be necessary to:

- (1) Determine the need for relocation assistance.
- (2) Provide current and continuing information on the availability, prices and rentals of comparable and decent housing and locations for displaced businesses.
- (3) Assist a person displaced from his business or farm operation in obtaining and becoming established in a suitable replacement location.

If I'm displaced, does the federal agency have to help me find a new dwelling?

Yes. For purposes of rendering relocation assistance and for computation of the replacement housing payment, a comparable replacement dwelling is one which is decent, safe, and sanitary, and is:

- (1) Functionally equivalent and substantially the same as the acquired dwelling, including newly constructed housing.
- (2) Adequate in size to meet the needs of the displaced family.
- (3) Reasonably accessible to the displaced person's place of employment.
- (4) Within the financial means of the family.
- (5) Available on the market to the family.

If necessary to provide replacement housing which meets the above definition, the federal agency is empowered to build new housing especially for the use of displaced persons, or to insure mortgages.

Does the federal agency have to help the owner of a displaced farm operation relocate on a new farm?

While this question is not addressed directly by the Act or the court decisions interpreting the Act, it seems clear that the purpose of the Act can be achieved only if the relocating agency specifically undertakes to help farm operators relocate.

* Relocation must be to farms reasonably near the present operation and must be amenable to the same type of agriculture that the displaced operator practiced at the prior location. It also follows from the language of the Act that relocating farm operations must also be provided with a "comparable replacement dwelling." This means that the new farmhouse must be

decent, safe and sanitary. If the only available farm property has an inadequate house or no house at all, it is the agency's obligation to construct a new house on that location.

The Act is not complied with if a dislocated person whose business is agriculture is offered only replacement housing in a town or city, away from available farms.

Does it pay to fight?

If you are convinced—based upon sound, independent information—that you are being offered a fair price, then you should settle. But there are numerous cases where the offers are not fair. In a recent case (summer 1974) involving a water resources project in North Dakota, a court awarded **more than double** the amount of the best offer made by the federal agency. It is important to also emphasize that there have been cases where farmers turned down a fair offer only to have a court award a lesser amount. But the inescapable fact is that in a majority of cases landowners who in good faith and based on sound information contest their cases are successful in increasing their ultimate recovery.

In this light it is worthwhile to indicate that many federal agencies employ their own full-time appraisers. These persons are not independent of the agencies for which they work. Also, most federal agencies are usually working under budgetary pressures and will understandably attempt to minimize the total cost of land acquisition for a given project.

As soon as you discern that the agency is not making the offer that you think you are entitled to under the Constitution, it is important to contact a lawyer. Most lawyers will probably charge a reasonable, hourly fee to discuss the facts of your case. If the two of you agree to contest the condemnation award, a fee arrangement will be determined. It is customary for many lawyers in cases of this type to accept a contingency fee contract where the lawyer is paid nothing unless the result is an award higher than the amount already offered by the agency. Thus a fee will be paid only if the lawyer's efforts on your behalf result in an increase in the award. You should also anticipate paying an appraiser for services as an expert witness.

Every case is different and generalizations are difficult to draw. Even after you have retained a lawyer, however, the chances of actually going to court are small. Your lawyer will make every effort to arrange a satisfactory settlement through negotiation.

In the past some agency personnel charged with land acquisition may have urged landowners to settle immediately without consulting independent advice and legal counsel. The reasons for such advice might or might not be innocent, but you are urged to resist any such suggestions and gather as much information and advice as possible before settling.

Condemnation cases are successfully contested very often. You should not fail to seek what is considered to be a fair price simply because you do not want "the bother" of a contest. Under our system, those who benefit most from our constitutional rights are those who vigorously exercise them.

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